STATE OF MICHIGAN

COURT OF APPEALS

NORMA GRISWATCH and DOLORES W. LIPCHIK, Plaintiffs-Appellants, v PAUL NIEDZWIECKI, Defendant-Appellee.	UNPUBLISHED April 24, 2008 No. 275188 Presque Isle Probate Court LC No. 04-007955-ML

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order dismissing, on statute of limitations grounds, their claim of a breach of fiduciary duty. Plaintiffs challenge that order and an additional order dismissing their claims involving incapacity and involving the scope of authority under a 1978 power of attorney. This action involved a dispute to the proper title of real property, a 120-acre farm currently titled solely in defendant. We affirm in part, reverse in part, and remand for further proceedings.

This action arose well after the decedent, the mother of plaintiffs and of defendant's late wife, Edith Niedzwiecki, added Edith in 1972 as a joint tenant of the farm, which the decedent solely owned. The decedent was incapable of caring for herself for some time following her husband's death, and it is undisputed that Edith and defendant cared for her for well over 20 years before her death in 1999. In 1978, the decedent executed a power of attorney in favor of Edith with respect to the farm. In 1992, Edith added defendant as a joint tenant of the farm. Edith passed away in 1995, and plaintiffs contend that they are entitled, under intestate principles, to a portion of the farm because, but for the addition of defendant as a joint tenant in 1992, the property would have transferred to them.

Plaintiffs filed suit and alleged incompetency of the decedent and undue influence and breach of fiduciary duty by Edith, along with an additional claim that Edith acted beyond the scope of authority granted in the power of attorney. Following a bench trial, the court found that plaintiffs failed to carry their burden with regard to the decedent's being incompetent at the time the power of attorney was executed. The court also concluded that the power of attorney was broad enough to allow Edith to add defendant as a joint tenant. After a second bench trial, the court concluded that plaintiffs' remaining claims were barred by the three-year limitations period in MCL 600.5805(10).

Plaintiffs first argue that the trial court erred in concluding that the power of attorney was broad enough to allow Edith to add defendant as a joint tenant of the property. We disagree. After a bench trial, a trial court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. MCR 2.613(C); *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005). A finding is clearly erroneous if, after a review of all the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

A power of attorney is to be interpreted according to principles governing the law of agency. *Vanderwall v Midkiff*, 166 Mich App 668, 677; 421 NW2d 263 (1988). Generally, a power of attorney "should be strictly construed" and it "cannot be extended by construction." *Long v City of Monroe*, 265 Mich 425, 427; 251 NW 582 (1933). Document language is given its plain and ordinary meaning, and a court may refer to a dictionary when terms are undefined. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471-472; 688 NW2d 523 (2004). However, a power of attorney should be interpreted to effectuate the intent of the parties, and if the obvious purpose of the instrument is to give the attorney the broadest possible power in dealing with the principal's real estate, that purpose should be effectuated. See *Continental Nat'l Bank v Gustin*, 297 Mich 134, 148; 297 NW 214 (1941).

The power of attorney, in part, provided Edith with the authority "to sell, mortgage, rent, and manage" all the real estate owned by the decedent. "Manage" means "to take charge of; supervise." *Random House Webster's College Dictionary* (1997). Evidence at trial indicated that Edith added defendant as a joint tenant to allow him to care for the decedent in the event Edith predeceased the decedent. This is consistent with the authority to "manage" the property, because it would have allowed defendant, as a joint title holder, to enter into any necessary transactions involving the property that were required for the decedent's wellbeing. Indeed, the power of attorney document indicates, in broad language, that Edith possessed the power to "generally act in the premises as effectually as" could the decedent. The power to effectually act is the power to produce an intended effect. See *Random House Webster's College Dictionary* (1996) (defining the adjective "effectual"). Under the circumstances, and given all the language of the power of attorney document, we conclude that no error occurred concerning the authority granted to Edith.

Plaintiffs next argue that the trial court erred in applying a three-year limitations period instead of the 15-year limitations period in MCL 600.5801(4). Whether a particular limitations period applies to a party's action presents a question of law reviewed de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). Here, the gravamen of the complaint was plaintiffs' attempt to quiet title in the farm. Because the allegedly harmed interest involved real property, we agree that the 15-year statute of limitations period applies, rendering this action timely. See *Adams v Adams* (*On Reconsideration*), 276 Mich App 704, 710-711, 719; 742 NW2d 399 (2007).

The trial court did not address the merits of plaintiffs' claims regarding breach of fiduciary duty and undue influence because it relied exclusively on the three-year limitations period as an affirmative defense. As *In re Estate of Karmey*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529; 251 NW 77 (1976), observes, a claim of undue influence requires that the plaintiff show

> "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient."

A presumption of undue influence arises when there is evidence of the following:

> "(1) the existence of a confidential or fiduciary relationship[1] between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." [*Karmey*, *supra* at 73, quoting *Kar*, *supra* at 537.]

In these circumstances, the burden shifts to the defendant to rebut the presumption. *In re Peterson Estate*, 193 Mich App 257, 260; 483 NW2d 624 (1991). Whether this presumption has been rebutted is a question fact. *Id*. at 262.

As for breach of fiduciary duty, in the power of attorney context, "an agent may engage in self dealing if the principal consents and has knowledge of the details of the transaction." *In re Estate of Cummin*, 474 Mich 1117, 1117; 712 NW2d 447 (2006). Further, a change in the principal's mental status does not affect the agent's authority to transfer the property if the principal had consented to the transaction with knowledge of its details. *Id*. Depending on the factual circumstances, self-dealing may arise when the transaction involves a relative of the agent. See, e.g., *Thiel v Cruikshank*, 96 Mich App 7, 10-12; 292 NW2d 150 (1980) (concluding that a transaction involving the personal representative of the estate and his son constituted improper self-dealing).

This Court's role is to review the trial court's decision but not to make factual findings. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34 n 12; 609 NW2d 567 (2000). Because these claims involve factual disputes that the trial court has yet to address, we remand for further proceedings.

Plaintiffs finally argue that the trial court erred in finding that they did not carry their burden of showing that the decedent was incompetent at the time she executed the power of attorney. This issue has been waived because plaintiffs' counsel agreed as much following the first bench trial. *Roberts v Mecosta Co Hosp*, 466 Mich 57, 64 n 4; 642 NW2d 663 (2002). In any event, the trial court's findings were not clearly erroneous. While there was substantial evidence to show that the decedent was not self-sufficient and required constant care from the early 1970s until her death, there was insufficient evidence relating to her mental capacity at the

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[1] A fiduciary relationship exists between the grantor and grantee of a power of attorney. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983).

time the power of attorney was executed so as to establish that she was incompetent. See *Persinger v Holst*, 248 Mich App 499, 503, 507; 639 NW2d 594 (2001).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Patrick M. Meter